

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KENNETH VELDHEER and KAREN
VELDHEER, husband and wife,

Respondents,

v.

PREMIER COMMUNITIES, INC., a
Washington State registered contractor;
INSURANCE COMPANY OF THE WEST,
Washington State Contractor's Bond No.
2174030, a foreign surety company; and
DEVELOPERS SURETY & INDEMNITY
CO., Washington State Contractor's Bond No.
572746C, a foreign surety company,

Appellants.

No. 37557-5-II

UNPUBLISHED OPINION

Bridgewater, J. — Premier Communities, Inc., a homebuilder, appeals from confirmation of an arbitration award granting attorney fees to Kenneth and Karen Veldheer (the Veldheers). We hold that the arbitrator did not exceed his authority when he granted the Veldheers monetary damages rather than ordering Premier to repair the alleged deficiencies. But we reverse the superior court's award of attorney fees for the arbitration proceeding because the arbitrator had not awarded fees. We remand to the trial court for a determination of fees and costs in the statutory action against the bonding companies because that was an action against them, not under the arbitration clause but under the statute; and we award attorney fees to the Veldheers for enforcing the arbitration, including those for the appeal to be determined by the superior court.

Thus, we affirm in part, reverse in part, and remand.

FACTS

Premier Communities, Inc. is a home builder operating principally in Thurston County. In October 2005, the Veldheers purchased a Premier home located in Olympia in the Cooper Crest subdivision. Their purchase and sale agreement (PSA) incorporated by reference the 2-10 Home Buyers Warranty Booklet (Warranty). Specifically, the PSA provides that all disputes between the parties shall be subject to binding arbitration under “the most recent edition of the Warranty.” CP at 223. The Warranty’s effective date¹ was November 23, 2005.²

The Veldheers eventually noticed problems in their home, including water accumulating in the crawl space and defective tiling on the kitchen counter. They reported these problems to Premier on October 24, 2006.

Under the Warranty, Premier had 60 days to either “repair or, at its option, pay [the Veldheers] the cost of repair of these Defects.” CP at 302. Premier did not make any repairs to the crawl space. It made what the Veldheers deemed defective repairs to the tiling on the kitchen island. After the 60 days, the Veldheers complied with the Warranty by sending a notice of complaint to Home Buyers Warranty (HBW), the Warranty administrators. Under the Warranty, once HBW received the Veldheers’ notice, HBW would again notify Premier of their complaints. Furthermore, if the two parties were unable to resolve their differences, they had to arbitrate the

¹ The warranty became effective on the date of the first title transfer or occupancy.

² The record suggests that the Veldheers did not receive the Warranty until they requested a copy as a result of the alleged deficiencies in their house. Before the superior court, the Veldheers argued that their PSA and Warranty were adhesion contracts and unconscionable. They do not assert these arguments on appeal.

dispute. The Veldheers accordingly requested arbitration on July 10, 2007, eight months after they first reported the problems to Premier.

In addition to their arbitration request, the Veldheers filed a complaint in Thurston County Superior Court on August 31, 2007. In that complaint, they named Premier and Premier's two sureties, Insurance Company of the West³ and Developers Surety & Indemnity Company⁴ (collectively referred to as Premier's bonding companies). They alleged that the defendants violated chapter 19.86 RCW, Washington's Consumer Protection Act (CPA). The Veldheers sought damages under the CPA. In addition, they sought damages from Premier's bond companies under Washington's Contractor's Registration Act (CRA), chapter 18.27 RCW. Finally, the Veldheers sought enforcement of the arbitration and attorney fees, interest, and costs under contract, statute, and the laws of Washington.

According to the Veldheers, under RCW 18.27.040 they had to file their claims in superior court in order to obtain any judgment for damages against Premier's bond companies up to the available sums of the bonds. The Veldheers attached the arbitration notice to their claims. Premier responded to the Veldheers' lawsuit by filing a motion to dismiss and seeking sanctions. Premier contended that by filing the lawsuit, the Veldheers violated a provision in their Warranty that prohibited the parties from filing any claims as a "reason to delay, to refuse to participate in, or to refuse to enforce this arbitration agreement." CP at 306.

The Veldheers offered to stipulate to a stay of the proceedings, pending outcome of the

³ Washington State Contractor's Bond No. 2174030.

⁴ Washington State Contractor's Bond No. 572746C.

arbitration. Premier declined the stay but the superior court granted the motion and entered an order staying the proceedings.

Premier next filed a motion to dismiss the arbitration. It asked the arbitrator to dismiss all “claims asserted in the Superior Court action and the claims for monetary damages on the basis that the claims are barred under express provisions of the PSA and/or the Warranty itself.” CP at 405. The arbitrator deferred his ruling on Premier’s motion until the arbitration hearing.

At the arbitration hearing on February 12, 2008, the parties presented evidence, testimony, and argument. On February 25, 2008, the arbitrator determined that the Veldheers had not established that Premier breached sections 1.2 (drainage) and 2.1 (cast in place concrete) of the Warranty. But the arbitrator determined that Premier had breached sections 5.1 (waterproofing) and 7.3 (hard surfaces). For the breach of section 5.1, the arbitrator awarded the Veldheers \$32,500 in damages. For the breach of section 7.3, the arbitrator awarded the Veldheers \$536.60. In addition, the arbitrator denied the Veldheers request for attorney fees under Washington’s CPA and CRA.

Premier sought clarification of the arbitrator’s award on March 3, 2008. It contended that the arbitrator violated RCW 7.04A.230 by exceeding his powers by awarding damages rather than ordering Premier to remedy the alleged breaches. The arbitrator declined to modify the award on March 12, 2008. The same day, Premier filed a declaration from its vice president, Stephen R. Graham. Premier asserted that the declaration “confirms Premier’s contentions regarding the remedies available under the 2-10 Home Buyer Warranty at issue.” CP at 469. The arbitrator again declined to modify the award.

Meanwhile, the Veldheers moved the superior court to lift the stay, confirm the arbitrator's award, and award attorney fees and costs for both the arbitration and superior court action. Premier opposed Veldheers' motions, arguing that the Warranty prohibited damages, attorney fees, and costs.

The superior court confirmed the arbitrator's award. It held that the parties agreed to arbitrate under the American Arbitration Association (AAA) Construction Industry Rules, one of which states that an arbitrator may grant any remedy or relief that the arbitrator deems just and equitable within the scope of the parties' agreement. Additionally, the superior court granted the Veldheers' request for attorney fees and costs for both the arbitration and superior court action. It found that the Warranty explicitly entitled the Veldheers to attorney fees for enforcing the arbitration provisions. Furthermore, the superior court noted that, under the RCW 18.27.040(6), the prevailing party in an action filed against the contractor and the contractor's bond or deposit for breach of contract by a party to a construction contract is entitled to reasonable attorney fees, costs, and interest. Thus, it awarded the Veldheers' reasonable attorney fees and costs, presumably on that basis.

After the superior court filed the judgment, the parties discovered a scrivener's error. The Veldheers invited Premier to jointly present an amended judgment to the superior court, but Premier declined and, instead, requested that the Veldheers note the amended judgment for hearing. At that hearing, the superior court amended the total judgment amount. The Veldheers requested additional attorney fees. The superior court authorized an additional \$200.00 for attorney fees. The total judgment amounted to \$52,367.60, which included \$18,200.00 in

attorney fees.

On April 4, 2008, Premier appealed the original March 21, 2008 judgment. It did not appeal the amended judgment entered on April 11, 2008. The Veldheers filed a motion on the merits on October 28, 2008. A commissioner of this court denied that motion without oral argument.

ANALYSIS

I. Arbitrator's Authority to Award Damages

Premier first contends that the superior court erred when it confirmed the arbitrator's damage award. It claims that under the PSA, the arbitrator did not have authority to award damages. The Veldheers disagree, as do we.

Arbitration is a statutory special proceeding controlled by chapter 7.04A RCW. In reviewing an arbitration award under chapter 7.04A RCW, we use the same review standard the superior court applied. *Barnett v. Hicks*, 119 Wn.2d 151, 153-54, 829 P.2d 1087 (1992). A superior court may only confirm, vacate, modify, or correct an arbitrator's award. *Barnett*, 119 Wn.2d at 156. "If none of the statutory bases exists for vacation, modification [sic] or correction, the court must, on a motion of one of the parties within 1 year of the award, confirm the award." *Barnett*, 119 Wn.2d at 157.

RCW 7.04A.230(1) governs the superior court's power to vacate an arbitration award. Premier contends that the superior court should have vacated the award pursuant to subsection (d), requiring the court to vacate an award if, "An arbitrator exceeded the arbitrator's powers." RCW 7.04A.230(1)(d). To determine whether an issue was presented to the arbitrator, we

consider the face of the award in light of the arbitration agreement, the demand, and any documents reflecting the charge to the arbitrator. *Hanson v. Shim*, 87 Wn. App. 538, 546, 943 P.2d 322 (1997), *review denied*, 134 Wn.2d 1017 (1998).

Premier bears the burden of proof. *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990). Washington courts confer substantial finality on arbitrators' decisions rendered according to the parties' contract and chapter 7.04A RCW. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1988). Judicial scrutiny does not include reviewing an arbitrator's decision on the merits. *Barnett*, 119 Wn.2d at 157. "The grounds for vacation must appear on the face of the award." *Westmark Props., Inc. v. McGuire*, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989). "A statement of reasons for the award is not part of the award." *Westmark*, 53 Wn. App. at 403. To vacate an award under RCW 7.04A.230(1)(d), the face of the award must show the adoption of an erroneous rule or mistake in applying the law. *Lindon*, 57 Wn. App. at 816. In other words, an error of law must appear on the face of the award. *Westmark*, 53 Wn. App. at 403 n.1.

Here, the PSA agreement between the Veldheers and Premier contained the following provision relating to arbitration, "all claims, disputes and controversies between Purchaser and Seller . . . shall be submitted to binding arbitration by and pursuant to the arbitration provision contained in the most recent edition of the Warranty." CP at 223. Turning to the arbitration provision in the Warranty, it states in bold print: "The arbitration shall be conducted by the [AAA] pursuant to its Construction Industry Arbitration Rules." CP at 258. Thus, two sources define the scope of the arbitration—the PSA and the AAA rules.

Under the Home Construction Industry Arbitration Rules and Mediation Procedures, ARB-43 defines the permissible form and scope of awards that an arbitrator may grant. *See* ARB-43. ARB-43(a) states: “The arbitrator may grant any legally available remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract.” CP at 452. Therefore, under the applicable arbitration rules, the arbitrator had broad authority to grant any remedy or relief, including a monetary award.

Premier contends that the arbitrator exceeded his authority because a provision of the Warranty provided that “The Builder or the Warranty Insurer shall have the option to repair, replace or pay You the reasonable cost of repair of any covered Defect or Structural Defect.” CP at 258. Premier attempts to impose this as a limitation on the ability of the arbitrator to impose damages, but it asserts that the remedy available to the arbitrator is limited to ordering Premier to repair or pay for its repair. But by agreeing that any dispute between the Veldheers and Premier would be submitted to arbitration under the American Arbitration Association rules, Premier agreed that the arbitrator could make a monetary award to the Veldheers. Furthermore, the arbitration provision in the Warranty specifies that “[a]ny disputes concerning the interpretation or the enforceability of this arbitration agreement . . . shall be decided by the arbitrator.” CP at 258-59.

Premier presented its argument that the arbitrator lacked authority to grant a monetary award directly to the arbitrator three times. The arbitrator thrice determined that he had authority to grant the Veldheers a monetary award. The superior court agreed and confirmed the

arbitrator's decision. Nevertheless, Premier invites us, as it did the superior court, to go beyond the face of the award and interpret the Warranty provisions. This invitation is improper because, "in ruling that the arbitrator had exceeded his power in granting piecemeal rescission [of the contract] the court went beyond the face of the award and independently interpreted the provisions of the contracts and contractual intent of the parties. . . . This a court may not do." *Boyd v. Davis*, 75 Wn. App. 23, 27, 876 P.2d 478 (1994) (internal quotations omitted), *aff'd*, 127 Wn.2d 256, 897 P.2d 1239 (1995).

Premier seeks to obtain an opposite result from the arbitrator's final decision. Premier asks us to construe various provisions of the PSA and the Warranty. Chapter 7.04A RCW strictly prohibits this. Phrased another way: "The only question, therefore, for the superior court here should have been whether the parties bound themselves to arbitrate the particular dispute." *Munsey v. Walla Walla College*, 80 Wn. App. 92, 96, 906 P.2d 988 (1995) (internal quotations omitted). "[I]f the dispute can fairly be said to involve an interpretation of the agreement, the inquiry is at an end and the proper interpretation is for the arbitrator." *Munsey*, 80 Wn. App. at 96 (internal quotations omitted). Similarly here, the parties arbitrated interpretation of the remedies available under the PSA and the AAA. That interpretation is reserved for the arbitrator.

The face of the arbitrator's award does not include language from the warranty provisions at issue. There is no error of law on the face of the arbitrator's award. Accordingly, the superior court properly reviewed the arbitrator's award. Based on that review, the superior court properly determined the arbitrator had authority to award monetary damages. The superior court did not err. *See Barnett*, 119 Wn.2d at 157; *Boyd*, 75 Wn. App. at 27.

II. Attorney Fees Awarded by the Superior Court

Premier also contends that the superior court erroneously modified the arbitration agreement when it granted the Veldheers \$18,200 in attorney fees and costs. The Veldheers maintain that the superior court properly awarded attorney fees and costs in their separate action. The Veldheers correctly assert that the superior court had authority to grant attorney fees under RCW 18.27.040(6). But it did not have authority to grant attorney fees under the Warranty for the arbitration.

The arbitrator denied the Veldheers' request for attorney fees. He reasoned that they were not entitled to attorney fees under chapter 19.86 RCW because they failed to establish that Premier violated the CPA. The arbitrator further stated that the Veldheers were not entitled to attorney fees under the CRA, RCW 18.27.040(6), in the arbitration. The arbitrator did not refer to the Warranty or the PSA in rendering his attorney fee decision.

The superior court did, however, refer to the attorney fee provision in the Warranty,⁵ in addition to RCW 18.27.040(6). It stated:

As I read the warranty agreement, the warranty agreement says any party shall be entitled to recover reasonable attorneys' fees and costs incurred in enforcing this arbitration agreement, and yet the arbitrator refused to award attorneys' fees. Is that binding upon this Court?

Having reviewed this, I don't believe that the arbitrator had before him the issue of attorneys' fees. The issue that was submitted for arbitration was the issue of whether or not there was a liability for the damages, and he ruled in that regard.

Now that the matter is back before me, it does appear that the parties have agreed there is, indeed, this warranty that was agreed. It's a contract, if you will, that the prevailing party is entitled to attorneys' fees for enforcing the arbitration

⁵ The Warranty states in pertinent part:

Any party shall be entitled to recover reasonable attorney's [sic] fees and costs incurred in enforcing this arbitration agreement.

CP at 305.

provisions. For that reason, I feel that attorneys' fees that were incurred during the preparation for the arbitration and in the matters before the Court since that arbitration are properly subject to this Court awarding attorneys' fees and costs.

Now that leaves us, if you will, with the issue of attorneys' fees occurring or being incurred prior to the matter going to arbitration. And for that, I look at RCW 18.27.040(6), and that says the prevailing party in an action filed under this section against the contractor and the contractor's bond or deposit for breach of contract by a party to a construction contract is entitled to costs, interest, and reasonable attorneys' fees.

For all those reasons, I am inclined to grant costs and attorneys' fees to plaintiffs in this particular matter.

VRP (Mar. 21, 2008) at 5-6.

Awarding attorney fees or costs under a statute or contract is a matter of discretion with the superior court that we will not disturb absent a clear showing of an abuse of discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). But once again, when none of the statutory bases exists for vacation, modification, or correction of an arbitration award, the superior court must confirm the award. *Barnett*, 119 Wn.2d at 157. "The confirming court does not have collateral authority to go behind the face of the award or to determine whether additional award amounts are appropriate." *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 496-97, 946 P.2d 388 (1997).

Here, the superior court confirmed the arbitrator's award and independently granted the Veldheers' attorney fees, some of which involved the arbitration. In so doing, it went beyond the face of the arbitrator's award to analyze the availability of attorney fees under the PSA and Warranty. For the fees incurred in the arbitration, the award was improper. *Price*, 133 Wn.2d at 496-97; *see also Barnett*, 119 Wn.2d at 157. But the analysis of a grant of attorney fees does not end there, given the pleadings in this case.

There is no evidence in the record that the Veldheers sought attorney fees under the Warranty in arbitration. The arbitration award merely states that the Veldheers sought “an award of attorneys fees under RCW Ch. 19.86 and RCW 18.27.” CP at 440. Nonetheless, they sought attorney fees in the superior court action under “contract, statute, and the laws of the State of Washington.” CP at 12. The Veldheers cited to RCW 18.27 as authority for attorney fees. RCW 18.27.040(6) provides:

The prevailing party in an action filed under this section against the contractor and the contractor’s bond or deposit, for breach of contract by a party to a construction contract, is entitled to costs, interest, and reasonable attorneys’ fees.

The Washington Supreme Court recently examined RCW 18.27.040 in *Cosmopolitan Eng’g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006). Therein, the Supreme Court distinguished attorney fees incurred in an action against a contractor from attorney fees incurred in an action against a contractor’s bond. *Cosmopolitan*, 159 Wn.2d at 299. Specifically, the Supreme Court interpreted the attorney fee provision in RCW 18.27.040(6) to allow attorney fees to the prevailing party in actions against a contractor’s bond. *Cosmopolitan*, 159 Wn.2d at 299, 306. The statute does not provide authority for superior courts to award fees incurred in a related action for breach of contract. *Cosmopolitan*, 159 Wn.2d at 300 (“[A]n action against the bond must also necessarily claim that a contractor breached a contract or failed to pay.”).

Hence, in order to recover under RCW 18.27.040(6), a plaintiff must name both the contractor and the contractor’s bond or deposit. RCW 18.27.040(6); *Cosmopolitan*, 159 Wn.2d

at 301. But as the Supreme Court concluded, RCW 18.27.040(6) authorizes “attorney fees for the prevailing party only in actions against a contractor’s bond.” *Cosmopolitan*, 159 Wn.2d at 306.

Here, Premier’s bond companies were not parties to the arbitration. The underlying contract dispute was between the Veldheers and Premier, not the bonding companies. To be more specific, the bonding parties were not a party to the PSA and they were not bound by the Warranty arbitration clause incorporated by reference in the PSA. Because the bonding companies were not a party to the arbitration, the Veldheers necessarily did not meet the requirements to recover attorney fees under the bond statute in arbitration. *See* RCW 18.27.040(6); *Cosmopolitan*, 159 Wn.2d at 299-301. Therefore, the arbitrator appropriately denied attorney fees under RCW 18.27.040.

Nevertheless, the Veldheers had a right under the CRA to name Premier’s bonding companies in an original action in superior court under the CRA to recover the amounts of Premier’s bonds with those companies. *See* RCW 18.27.040(3).⁶ To recover under RCW 18.27.040(3), the Veldheers necessarily had to claim that Premier breached the PSA or failed to pay. *Cosmopolitan*, 159 Wn.2d at 300. In sum, the Veldheers properly named both Premier and Premier’s bond companies in its action to seek attorney fees under the CRA in the superior court. *See* RCW 18.27.040; *Cosmopolitan*, 159 Wn.2d at 300.

⁶ RCW 18.27.040(3) provides in pertinent part:

Any person, firm or corporation having a claim against the contractor for any of the items referred to in this section may bring suit upon the bond or deposit in the superior court of the county in which the work was done or of any county in which jurisdiction of the contractor may be had.

So long as the superior court's decision to award the Veldheers attorney fees under RCW 18.27.040(6) was not an abuse of discretion, the Veldheers are entitled to attorney fees up to the amount of the bonds. *See Cosmopolitan*, 159 Wn.2d at 306; *Boeing*, 108 Wn.2d at 65. The record here is unclear as to whether the superior court awarded attorney fees based on the Warranty or based on RCW 18.27.040(6). Therefore, we remand to the superior court to determine whether the Veldheers sufficiently met the elements of RCW 18.27.040(6), entitling them to recover attorney fees and costs from Premier's bond companies, up to the amount of the bonds.⁷ *Cosmopolitan*, 159 Wn.2d at 300-01, 306.

The trial court was in part correct to look to the Warranty provision; we also review that provision so far as it stands apart from the arbitration. It states: "Any party shall be entitled to recover reasonable attorney's [sic] fees and costs incurred in enforcing this arbitration agreement." CP at 305. We hold that this entitles Veldheers to fees and costs from the time of the entry of the arbitration award. That contractual agreement is not dependent on the bonding companies' liability but is a judgment against Premier and its bonding companies. And, once calculated, judgment can be entered against Premier and its bonding companies.

III. Attorney Fees on Appeal

Finally, the Veldheers seek attorney fees and costs on appeal. Under RAP 18.1, a party may recover attorney fees and expenses on appeal if an applicable law grants that right. As

⁷ Premier is a general contractor. As such, it was required to file surety bonds in the amount of \$12,000. RCW 18.27.040(1) (requiring applicant contractors to file with the Department of Labor and Industries a surety bond issued by an acceptable surety insurer in the amount of \$12,000 for general contractors and \$6,000 for specialty contractors). The superior court must determine the amount of the bonds and whether each bonding company here is liable for up to \$12,000 or only a total of \$12,000 is available.

discussed above, under RCW 18.27.040(6), the prevailing party in a breach of contract action filed under the CRA is entitled to attorney fees and costs and the appellate action is one to enforce the arbitration that entitles Veldheers to an award against Premier and its bonding companies (to the extent of their bonds). The Veldheers are the prevailing party on appeal; they are entitled to attorney fees and costs on appeal both against Premier and its bonding companies. RCW 18.27.040(6); RAP 18.1. We direct the superior court to determine and enter judgment under RAP 18.1(i) for these fees.

Affirmed in part, reversed in part, and remanded for the superior court to determine: (1) the amount of the attorney fees/costs related to the enforcement of the arbitration award; and (2) the amount of attorney fees/costs that the Veldheers are entitled to under RCW 18.27.040(6); to determine the amount of attorney fees for the appellate action; and to enter judgment.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Van Deren, C.J.

Penoyar, J.